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**Subject:** TRADEMARK APPLICATION NO. 78761852 - DAVIES GATE SUGAR PL - T12482US0  
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**UNITED STATES PATENT AND TRADEMARK OFFICE**

**SERIAL NO:** 78/761852

**MARK:** DAVIES GATE SUGAR PL

**CORRESPONDENT ADDRESS:**

Marnie Wright Barnhorst, Esq  
The Trademark Group, APLC  
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<http://www.uspto.gov/main/trademarks.htm>

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**APPLICANT:** Davies Gate LLC

**CORRESPONDENT'S  
REFERENCE/DOCKET NO:**  
T12482US0

**CORRESPONDENT E-MAIL ADDRESS:**  
[docketing@trademarkgroup.com](mailto:docketing@trademarkgroup.com)

**EXAMINING ATTORNEY'S APPEAL BRIEF**

The applicant has appealed the trademark examining attorney's final refusal to register the mark DAVIES GATE SUGAR PLUM on the Principal Register for "skin soap; liquid soap for hands, face and body; cream for the hands, face and body; shower and bath gel; skin lotion, non-medicated bath preparations; bath and body powders" in International Class 3 on the ground that the wording SUGAR PLUM is merely descriptive within the meaning of Trademark Act Section 6, 15 U.S.C. Section 1056 and must be disclaimed.

**FACTS**

The application to register the mark DAVIES GATE SUGAR PLUM on the Principal Register was filed as an Intent to Use under Section 1(b). The examining attorney initially assigned to the application

required that the applicant provide a disclaimer of SUGAR PLUM arguing that it names the scent of the goods and referenced the applicant's website demonstrating that the applicant frequently names its products after scents used therein.

The applicant argued against the disclaimer requirement. The application was re-assigned to the current examining attorney and a Final Office action was issued maintaining the requirement for the disclaimer. The applicant then filed a request for reconsideration after which the examining attorney denied the request and maintained the disclaimer requirement. The following appeal ensued.

#### ISSUE ON APPEAL

The only issue on appeal is whether the wording SUGAR PLUM describes an ingredient, quality, characteristic, function, feature, purpose or use of the relevant goods.

#### ARGUMENT

#### **THE WORDING "SUGAR PLUM" IS MERELY DESCRIPTIVE OF THE INGREDIENT, FEATURE, SCENT OR CHARACTERISTIC OF THE APPLICANT'S GOODS.**

The Board is requested to take judicial notice of the following dictionary definitions which consistently describe a sugar plum as being a sugary candy with added flavoring and colors.<sup>[1]</sup> See specifically the online Oxford dictionary<sup>[2]</sup> which defines a sugarplum as "a small round candy of *flavored* boiled *sugar*." The American Heritage Dictionary<sup>[3]</sup> describes a sugarplum as "a small round piece of *sugary* candy." And Dictionary.com<sup>[4]</sup> defines sugarplum as "a small sweetmeat made of *sugar* with various *flavoring and coloring ingredients*." Thus, a sugar plum is more than just "a small candy" as incompletely defined by the applicant, but is a sugary candy made with flavorings and colorings. Hence the wording in the mark evokes a sense of smell, color and taste to the user's imagination.

The applicant seems to be of the opinion that the mark must describe every aspect of the goods to be descriptive. It is not necessary that a term describe all of the purposes, functions, characteristics or features of the goods/services to be merely descriptive. It is enough if the term describes one attribute of the goods/services. *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). TMEP §1209.01(b). In this case the applicant repeatedly describes its goods in its advertisements as:

- “Scented with a blend of ripe plums, light notes of luscious peach and sugar-sweet vanilla.”
- “A triple wonder that softens lips, makes them extra full with light color and deliciously flavors them with Sugar Plum.”
- Nourishing Hand Cream: Sugar Plum – “this ultra moisturizing sugar plum hand cream smells wonderful...”
- “Infused with the Scent of ripe plums, with light notes of luscious peach and sugar-sweet vanilla.”<sup>[5]</sup>

The applicant’s own advertisements indicate that the sugar describes the sweet scent of the goods and plum describes the color and scent of the goods. Therefore based on this description, the applicant’s goods can be described as having the scent of sugary plums just as identified in the mark. In addition, the applicant’s goods are shown in the color purple, i.e., the color of plums, and shaped in the form of a purple plum.<sup>[6]</sup> Therefore the wording sugar plum describes a scent and feature of the goods.

The applicant’s description indicates that the mark is a combination of merely descriptive terms. A mark that combines descriptive terms may be registrable if the composite creates a unitary mark with a separate, nondescriptive meaning. *In re Colonial Stores, Inc.*, 394 F.2d 549, 157 USPQ 382 (C.C.P.A. 1968) (holding SUGAR & SPICE not to be merely descriptive of bakery products). However, the mere combination of descriptive words does not automatically create a new nondescriptive word or phrase. *E.g.*, *In re Associated Theatre Clubs Co.*, 9 USPQ2d 1660, 1662 (TTAB 1988) (finding GROUP SALES BOX OFFICE descriptive for theater ticket sales services). The registrability of a mark created by combining only descriptive words depends on whether a new and different commercial impression is created, and/or the mark so created imparts an incongruous meaning as used in connection with the goods and/or services. Where, as in the present case, the combination of the descriptive words creates no incongruity, and no imagination is required to understand the nature of the goods and/or services, the mark is merely descriptive. *E.g.*, *In re Copytele Inc.*, 31 USPQ2d 1540, 1542 (TTAB 1994); *Associated Theatre Clubs*, 9 USPQ2d at 1662. *See, e.g.*, *In re Tower Tech, Inc.*, 64 USPQ2d 1314 (TTAB 2002) (SMARTTOWER merely descriptive of “commercial and industrial cooling towers and accessories therefor, sold as a unit”); *In re Sun Microsystems Inc.*, 59 USPQ2d 1084 (TTAB 2001) (AGENTBEANS merely descriptive of “computer software for use in development and deployment of

application programs on a global computer network"); *In re Putman Publ'g Co.*, 39 USPQ2d 2021 (TTAB 1996) (FOOD & BEVERAGE ON-LINE merely descriptive of news and information service for the food processing industry); *In re Copytele Inc.*, 31 USPQ2d 1540 (TTAB 1994) (SCREEN FAX PHONE merely descriptive of facsimile terminals employing electrophoretic displays); *In re Entenmann's Inc.*, 15 USPQ2d 1750 (TTAB 1990) (OATNUT held to be merely descriptive of bread containing oats and hazelnuts).

The applicant argues that the wording is merely suggestive and does not describe a "small candy." The examining attorney notes however that the wording does describe a flavored sugary candy featuring a plum scent. The examining attorney points to the evidence submitted with the Final Office action dated December 5, 2006 which identifies "sugar plum" as a fragrance or scent in cosmetic products.

- Fragrances include maraschino mist, vanilla latta, **sugar plum**, powdered sugar, peppermint cream, sugar cookie and fudge brownie."
- **Sugar Plum** Vegan Whipped Body Frosting - Super Moisturizing, Extra Fragrant – "A unique twist on a classic *scent*."
- **Sugar Plum** Souffle Massage Cream - containing **plum nectar**

The previously attached evidence also shows that numerous 3<sup>rd</sup> party companies use the wording "sugar plum" to describe the color or scent of their cosmetics. For example,

- Mary Kay Signature Eye Color, Sugar Plum
- Sugar Plum Revitalizing Masque by Eminence
- Sugar Plum Souffle Massage Cream Treatment by Eminence
- Sugar Plum Oil Free Revitalizer by Eminence
- Sugar Plum Whip Moisturizer by Eminence
- The following scents were identified on "Two Palm Soaps" for Decadent Body Lotion : Van Orange, Tropical Treat, Lavender Rose, Lavender, Blue Angels, Lemon Colada, Peach Berry, **Sugar Plum**, Green Apple, Apple Harvest
- The Custom Blend Fragrance Oil entitled Christmas Sampler states: "Get 1 fl oz. of Christmas Splendor, Hollyberry, **Sugar Plum**, Merry Mistletoe, Gingerbread Man.
- Bath and Body Works **Sugar Plum** Splash Shower Gel.
- 100% Pure Natural Lip Gloss **Sugar Plum** Sheer – Juicy glosses made with patented pure fruit pigments in a base of 83% Vitamin E.

Therefore based on the evidence above, the wording "sugar plum" describes a feature or characteristic of the goods and does not indicate the source of the goods.

**Conclusion**

The refusal to register on the basis of Trademark Act Section 6, 15 U.S.C. Section 1056, should be affirmed because the wording SUGAR PLUM is merely descriptive of a feature, scent, characteristic or ingredient of the applicant's goods.

Respectfully submitted,

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Trademark Attorney  
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Dan Vavonese  
Managing Attorney  
Law Office - 109

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[1] The University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc., 213 USPQ 594 (TTAB 1982), citing, In re Mark A. Gould, M.D. et al., 173 U.S.P.Q. 243 (TTAB 1972).

[2] The Oxford Pocket Dictionary of Current English 2007.

[3] The American Heritage® Dictionary of the English Language, Fourth Edition 2006.

[4] Dictionary.com Unabridged (v 1.1) Based on the Random House Unabridged Dictionary, © Random House, Inc. 2006.

[5] See evidence attached to the March 19, 2007 Office action.

[6] See the Bath Fizz Pop with Body Oil Filling in Sugar Plum attached to the Office action dated March 19, 2007

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## sugarplum

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-n. a small round candy of  
flavored boiled sugar.

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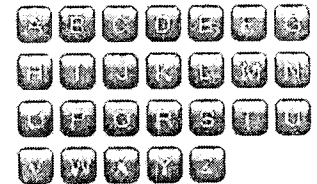
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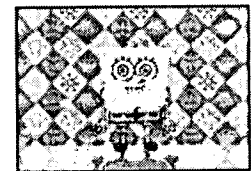
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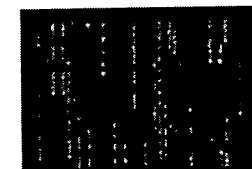
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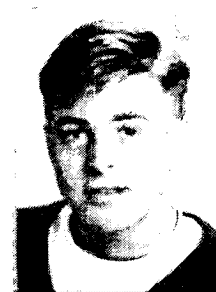
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*noun*

a small sweetmeat made of sugar with various flavoring and coloring ingredients; a bonbon.

[Origin: 1600-10; SUGAR + PLUM<sup>1</sup>]

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n. A small round piece of sugary candy.

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*noun*

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